

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

WHITNEY NATIONAL BANK,

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Plaintiff,

*

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v.

CASE NO.: 2:07-cv-414-MEF

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**SAFETY GUIDE OF ALABAMA, LLC
and THOMAS J. MILLS,**

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Defendants.

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**MOTION TO DISMISS, OR, ALTERNATIVELY, TO QUASH PURPORTED SERVICE
ON DEFENDANT SAFETY GUIDE OF ALABAMA, LLC**

Defendant Safety Guide of Alabama, LLC (“Safety Guide”) hereby appears for the limited purpose of moving this Court, pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, to dismiss the claims against Safety Guide or quashing that service attempted on Safety Guide as detailed below, and as grounds therefore, states as follows:

This lawsuit was commenced on May 11, 2007 by Plaintiff Whitney Bank against Defendants Safety Guide and Tom Mills.¹ Plaintiff purported to perfect service on Safety Guide by serving the Summons and Complaint by certified mail to the following address: Safety Guide of Alabama, LLC c/o Michael C. Marcato Registered Agent, 552 Oliver Road, Montgomery, AL 36117. On May 15, 2007, Bob Mallett signed for and received the Summons and Complaint which was sent to Highway. [Exhibit 1].

Under Rule 4(h) of the Federal Rules of Civil Procedure, a domestic corporation may be served by “delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of

¹ According to the Court’s records, Defendant Tom Mills was served on May 15, 2007.

process....” A domestic corporation is also properly served if service is obtained in a manner consistent with the law of the state where the district court is located. Fed. R. Civ. P. 4(h)(1) and (e)(1). Alabama law similarly recognizes that service upon a domestic company is completed “by serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process.” Ala. R. Civ. P. 4(c)(6).

As shown by the attached declaration of Michael Marcato, Bob Mallett is not an officer or partner of Safety Guide, nor is he a managing or general agent of Safety Guide. [Decl. of M. Marcato]. Furthermore, Safety Guide has never appointed nor authorized Mr. Mallett to receive service of process on its behalf. [Id.]. Instead, Mr. Mallett is an employee of Safety Guide who is in charge of front desk sales of the safety products it sells. [Id.]. As such, the claims against Safety Guide are due to either be dismissed for insufficient service of process, or, in the alternative, the purported service on Safety Guide is due to be quashed.

A similar situation was addressed in *Villafana v. Auto-Owners Ins.*, 2006 WL 3834276 (S.D. Ala. Dec. 29, 2006). *Villafana* involved a dispute over insurance coverage and the plaintiff sought to serve the defendant adjusting company by certified mail sent to the home of the adjuster responsible for adjusting her claim. *Id.* at *1. The defendant adjusting company moved to dismiss for insufficient service or, in the alternative, to quash service, and supported the motion with evidence that the individual adjuster was not an officer or managing agent of the defendant company. *Id.* Because the plaintiff did not controvert this showing by the adjusting company, the Court granted the motion to quash service. *Id.* at *1-*2. *See also Rooney v. Southern Dependacare, Inc.*, 672 So.2d 1, 4 (Ala. 1995) (noting that record did not support an inference of proper service where only evidence of service was an individual’s signature on the

certified mail receipt, and evidence indicated that individual who signed was not an authorized agent to accept service).

Because Plaintiff has not served Defendant Safety Guide in compliance with either the Federal or Alabama Rules of Civil Procedure, the purported service upon Safety Guide is due to be quashed and/or the claims against Safety Guide are due to be dismissed.

WHEREFORE, for the reasons set forth hereinabove, Defendant Safety Guide of Alabama, LLC moves the Court to quash the purported service on Safety Guide of Alabama, LLC or, in the alternative, to dismiss the Complaint against it for insufficient service of process, and for such other and further relief as the Court deems appropriate in the premises.

/s J. David Martin

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J. David Martin (ASB-7387-A54J)
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**COUNSEL FOR DEFENDANT,
Safety Guide of Alabama, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of June, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Dennis R. Bailey**
drb@rsjg.com, pk@rsjg.com
- **Bowdy Jerome Brown**
bjb@rsjg.com

/s J. David Martin
Of Counsel

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SENDER: COMPLETE THIS SECTION

- Complete Items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Safety Guide of Alabama
 c/o Michael C. Marcato
 Registered Agent
 552 Oliver Road
 Montgomery, AL 36117

2. Article Number (Copy from service label)

7002 2030 0004 1449 8433

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)	B. Date of Delivery
<i>Bob Marcato</i>	<i>5-15-07</i>

C. Signature	<input type="checkbox"/> Agent
<i>X Bob Marcato</i>	<input type="checkbox"/> Addressee

D. Is delivery address different from item 1?	<input type="checkbox"/> Yes
If YES, enter delivery address below:	<input type="checkbox"/> No

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3. Service Type	
<input checked="" type="checkbox"/> Certified Mail	<input type="checkbox"/> Express Mail
<input type="checkbox"/> Registered	<input checked="" type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Insured Mail	<input type="checkbox"/> C.O.D.

4. Restricted Delivery? (Extra Fee)	<input type="checkbox"/> Yes
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**SAFETY GUIDE OF ALABAMA, LLC
and THOMAS J. MILLS,**

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Defendants.

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STATE OF ALABAMA

COUNTY OF MONTGOMERY

Declaration of Michael C. Marcato Pursuant to 28 U.S.C. § 1746

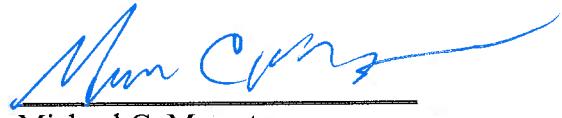
1. I am the Managing Member of Safety Guide of Alabama, LLC (“Safety Guide”), an Alabama Limited Liability Company.

2. Based on Court records, Whitney Bank attempted to serve Safety Guide by certified mail addressed to: Safety Guide of Alabama, c/o Michael C. Marcato Registered Agent, 552 Oliver Road, Montgomery, AL 36117. Bob Mallett signed the certified mail receipt on May 15, 2007.

3. Bob Mallett was not, on or about May 15, 2007, an officer, partner, managing agent or general agent for Safety Guide. Mr. Mallett is not, and was not on or about May 15, 2007, authorized by law or appointment to accept service of process on behalf of Safety Guide.

4. Safety Guide’s predominant business consists of the installation of highway safety supplies. However, Safety Guide also sells industrial and highway safety supplies to retail customers. Mr. Mallett is an employee of Safety Guide and handles the front desk sales of industrial and highway safety supplies.

5. I declare under penalty of perjury that the foregoing is true and correct. Executed
on this the 4th day of June, 2007.



Michael C. Marcato